Ang Tun Cheong v Lim Yeok Beng (Public Bank, Intervenor)

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–119 OF 2002
KAMALANATHAN RATNAM J
10 JULY 2002

Civil Procedure *— Parties — Intervention — Application to intervene — Right to intervene — Whether Public Bank Bhd had the right to intervene to be added as the second defendant — Rules of the High Court 1980 O 15 r 6(2)*

Civil Procedure *— Judgments and orders — Judgment — Setting aside — Default judgment — Non compliance of the Rules of the High Court 1980 — Whether judgment can be entered for the plaintiff — Rules of the High Court 1980 O 2, O 19 rr 5(1), 6, 7(1)*

The plaintiff and the defendant entered into a sale and purchase agreement for a piece of property and the deposit of 10% was paid to the plaintiff with the balance to be paid before or on 24 May 2000. The property was charged to Standard Chartered Bank ('SCB') by the plaintiff who owed SCB RM87,001.05. Public Bank Bhd ('PBB') granted the defendant two loan facilities and the defendant charged the property to PBB. The plaintiff gave to PBB a letter of undertaking and PBB then released the sum of RM87,001.05 to SCB. The two charges were then registered in favour of PBB. Subsequently, the defendant failed to pay the balance of the purchase price and the plaintiff terminated the agreement through his solicitor's letter dated 26 May 2000 and forfeited the deposit. The plaintiff filed the suit, praying for certain orders and the defendant entered appearance but filed his defence out of time. The plaintiff applied (encl 4) to strike out the defence and enter judgment and the defendant applied (encl 6) to extend time to file the defence. Enclosure 4 was allowed by the senior assistant registrar ('the SAR') and encl 6 was dismissed. The defendant then applied to set aside the SAR's order (encl 10) and for a stay of execution until the hearing of the appeal in chambers (encl 10A). Enclosure 10 was dismissed but encl 10A was allowed. The appeals against encll 4 and 6 were dismissed. On 29 April 2002, PBB applied to intervene by encl 20 and this was allowed and PBB was made the second defendant. The judgment in default of defence was set aside. The plaintiff appealed.

Held, allowing PBB the right to intervene and to be made the second defendant and setting aside the judgment in default of defence against the defendant:

(1) The said property had been charged to PBB. The plaintiff signed an undertaking with PBB even before the charge was registered and there had arisen a contractual relationship between the plaintiff and PBB. By registering the charge, PBB had obtained an indefeasible interest in the said property (see p 202G–H).

(2) Although O 15 r 6(2) of the Rules of the High Court 1980 ('the RHC') stated that an application to intervene may not be made after final judgment had been entered, if an applicant had an interest related to the subject matter, the court would allow him the right to intervene (see p 202H–I); *EON Bank Bhd v Pung Chong Thai* [2001] 5 MLJ 409 followed. Here, the intervener's interest in the said property had been registered. The plaintiff ought to have at least given notice to Public Bank Bhd or at least joined the said bank as a co-defendant to the action (see pp 202H–203A).

(3) The plaintiff had not extracted a fair order of the judgment of the learned SAR in respect of encll 4 and 6. The plaintiff had eight different prayers in his statement of claim and only if there was an order of court could the High Court ascertain if the plaintiff had complied with O 19 rr 5(1), 6 or 7(1) of the RHC, because it was clear that if the judgment was under O 19 r 7 of the RHC, that was, where the defendant failed to file a defence, judgment could not be entered for the plaintiff until an application was made by summons or motion. The curative powers under O 2 r 1 of the RHC to cure non-compliance with the RHC did not apply to default judgments or one taken contrary to O 19 r 7 of the RHC (see p 203D–F).

[**Bahasa Malaysia summary**

Plaintif dan defendan telah memasuki satu perjanjian jualbeli untuk sebuah hartanah dan wang deposit 10% telah dibayar kepada plaintif di mana bakinya hendaklah dibayar sebelum atau pada 24 Mei 2000. Hartanah tersebut telah digadaikan kepada Standard Chartered Bank ('SCB') oleh plaintif yang terhutang dengan SCB sebanyak RM87,001.05. Public Bank Bhd ('PBB') telah memberikan defendan dua kemudahan pinjaman dan defendan telah menggadaikan hartanah tersebut kepada PBB. Plaintif telah menghantar kepada PBB sepucuk surat akujanji dan PBB kemudian telah mengeluarkan jumlah RM87,001.05 kepada SCB. Kedua-dua gadaian tersebut kemudiannya telah didaftarkan bagi pihak PBB. Berikutan itu, defendan telah gagal untuk membayar baki harga jualan tersebut dan plaintif telah menamatkan perjanjian tersebut melalui surat peguamcara beliau bertarikh 26 Mei 2000 dan merampas deposit tersebut. Plaintif telah memfailkan guaman, memohon perintah-perintah tertentu dan defendan telah memasuki kehadiran tetapi telah memfailkan pembelaan beliau di luar had masa. Plaintif telah memohon (lampiran 4) untuk membatalkan pembelaan tersebut dan penghakiman dimasukkan dan defendan memohon (lampiran 6) untuk lanjutan masa bagi memfailkan pembelaan beliau. Lampiran 4 dibenarkan oleh penolong kanan pendaftar ('PKP') dan lampiran 6 telah ditolak. Defendan kemudiannya telah memohon untuk perintah PKP diketepikan (lampiran 10) dan satu penangguhan pelaksanaan

sehingga perbicaraan rayuan dalam kamar (lampiran 10A). Lampiran 10 telah ditolak tetapi lampiran 10A telah dibenarkan. Rayuan-rayuan terhadap lampiran-lampiran 4 and 6 telah ditolak. Pada 29 April 2002, PBB memohon untuk mencelah melalui lampiran 20 dan ini dibenarkan dan PBB telah dijadikan defendan kedua. Penghakiman ingkar terhadap pembelaan tersebut telah diketepikan. Plaintif merayu.

Diputuskan, membenarkan PBB hak untuk mencelah dan dijadikan defendan kedua dan mengenepikan penghakiman ingkar pembelaan tersebut terhadap defendan:

(1) Hartanah tersebut telah digadaikan kepada PBB. Plaintif telah menandatangani satu akujanji dengan PBB sebelum gadaian tersebut didaftarkan dan di situ telah terdapat satu hubungan kontraktual antara plaintif dan PBB. Dengan pendaftaran gadaian tersebut, PBB telah memperoleh satu kepentingan yang tak boleh disangkal ke atas hartanah tersebut (lihat ms 202G–H).

(2) Walaupun A 15 k 6(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') menyatakan bahawa satu permohonan untuk mencelah tidak boleh dibuat setelah penghakiman muktamad dimasukkan, sekiranya seorang pemohon mempunyai satu kepentingan berkaitan dengan perkara pokok, mahkamah akan membenarkan beliau hak untuk mencelah (lihat ms 202H–I); *EON Bank Bhd v Pung Chong Thai* [2001] 5 MLJ 409 diikut. Di sini, kepentingan pencelah ke atas hartanah tersebut telah didaftarkan. Plaintif patut sekurang-kurangnya memberikan notis kepada PBB atau menyatukan bank tersebut sebagai defendan bersesama dalam tindakan tersebut (lihat ms 202H–203A).

(3) Plaintiff tidak mengambil perintah penghakiman PKP yang bijaksana tersebut berhubung lampiran-lampiran 4 dan 6. Plaintif mempunyai lapan permohonan dalam pernyataan tuntutan beliau dan hanya jika terdapat satu perintah mahkamah maka Mahkamah Tinggi boleh memastikan jika plaintif telah mematuhi A 19 kk 5(1), 6 atau 7(1) KMT, kerana ia adalah jelas jika penghakiman tersebut jatuh di bawah A 19 k 7 KMT, di mana, defendan telah gagal untuk memfailkan satu pembelaan, penghakiman tidak boleh dimasuki bagi pihak plaintif sehingga satu permohonan dibuat melalui satu guaman atau usul. Kuasa-kuasa kuratif di bawah A 2 k 1 KMT untuk memulihkan ketidakpatuhan dengan KMT tidak terpakai kepada penghakiman-penghakiman ingkar atau yang bertentangan dengan A 19 k 7 KMT (lihat ms 203D–F).]

Notes

For cases on setting aside of judgments, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3555–3561.

A For cases on intervention, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4208–4236.

Cases referred to

B *EON Bank Bhd v Pang Chong Thai* [2001] 5 MLJ 409 (folld)
Syarikat Joo Seng & Anor v Habib Bank Ltd [1986] 2 MLJ 129 (refd)
Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, Intervenor) [1998] 5 MLJ 162 (refd)

C **Legislation referred to**

National Land Code s 340(1)
Rules of the High Court 1980 O 2 r 1, O 15 r 6(2), O 19 rr 5(1), 6, 7(1)

D *A Rajesh Kumar* (*AK Ang* with him) (*CG Oh & Ang*) for the plaintiff.
Cecil Rajendra (*Amir Abu* with him) for the defendant.
CK Cheah (*Cheah Choo Kheng & Shamsuddin*) for the intervenor.

Kamalanathan Ratnam J: By way of a sale and purchase agreement dated 24 November 1999, the plaintiff agreed to sell and the defendant agreed to E purchase a piece of land held under HS(D) 2817, Lot No 4514, Mukim 14, Daerah Seberang Perai Selatan, Negeri Pulau Pinang ('the property') at an agreed price of RM140,000 upon the terms and conditions set out in the said agreement. A deposit of RM14,000 was paid to the plaintiff upon execution of the said agreement. The balance of the purchase price was to be paid on or before 24 May 2000. The said property was, in the meantime, F charged to Standard Chartered Bank Malaysia Bhd ('SCB') by the plaintiff who owed the said bank at the time of the sale to the defendant, a sum of RM87,001.05. To enable the defendant to pay the balance of the purchase price, Public Bank Bhd ('PBB') granted the defendant two loan facilities namely: (a) a housing loan for RM50,000; and (b) an overdraft for RM60,000. The defendant then executed two charges in favour of PBB in G respect of the said property. Before the charges were registered, the plaintiff gave a letter of undertaking dated 15 April 2000 to PBB that he would refund to the said bank the loans released, if the memorandum of transfer could not be registered and/or certificate of fitness for occupation could not be obtained for whatever reason. Based on the said letter of undertaking, H PBB released the redemption sum of RM87,001.05 to SCB. The two charges were then registered in favour of PBB. In the meantime, the plaintiff had given the defendant vacant possession of the said property. Pursuant to the sale and purchase agreement, the defendant ought to have paid the balance of the purchase price by 24 May 2000. Since the defendant had failed to pay the balance by that date, the plaintiff, through his solicitor's I letter dated 26 May 2000, terminated the said sale and purchase agreement and forfeited the deposit of RM14,000. The defendant had however already charged the said property to PBB.

The plaintiff then filed this suit against the defendant and prayed for, inter alia: A

(i) a declaration that the defendant had breached the sale and purchase agreement and that the plaintiff has the right to forfeit the deposit of RM14,000;

(ii) an order that the deposit be forfeited; and B

(iii) an order that the defendant do give vacant possession and other consequential orders.

The defendant entered appearance and filed his defence out of time. The plaintiff then applied (encl 4) to strike out the defence and to enter judgment for filing the defence out of time. In the meantime, the defendant C filed an application (encl 6) to extend time to file the defence. Both applications were then fixed for hearing by the learned senior assistant registrar ('the SAR') on 29 August 2001. After hearing lengthy submissions, the learned SAR dismissed encl 6 and allowed the plaintiff's encl 4. The defendant then took out another application (encl 10) also to set aside the D judgment striking out the defence and giving judgment in default of defence. Having filed an appeal against the decision of the learned SAR in respect of both encll 4 and 6, the defendant applied for a stay of execution (encl 10A) until the hearing of the appeal by me in chambers. Having heard full arguments, the learned deputy registrar dismissed encl 10 with costs, but allowed encl 10A. E

On 28 November 2001, having heard submissions from both parties, I dismissed the appeals against encll 4 and 6 with costs.

On 19 March 2002, PBB applied by way of encl 20 to intervene and to set aside the judgment in default of defence and to add themselves as a party to the action as a second defendant. On 29 April 2002, I heard encl 20 and F allowed PBB to intervene and to be made a second defendant, and also set aside the judgment in default of defence dated 29 August 2001. Being dissatisfied with my decision, the plaintiff has appealed.

Findings of the court

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From the facts set out, it is clear that the said property has been charged to PBB and that on that basis, PBB had released the sum of RM87,001.05 to SCB, being the sum owed by the plaintiff to the SCB. The plaintiff had signed an undertaking with PBB even before the charge was registered. Surely, pursuant to this letter of undertaking there has arisen a contractual relationship between the plaintiff and PBB. By registering this charge, PBB H had obtained an indefeasible interest in the said property (see s 340(1) of the National Land Code ('the NLC')). In *EON Bank Bhd v Pang Chong Thai* [2001] 5 MLJ 409, I held that although O 15 r 6(2) of the Rules of the High Court 1980 ('the RHC') states that an application to intervene may not be made after final judgment has been entered, it was my judgment that where an applicant has an interest related to the subject matter, the court I would allow him the right to intervene. Similarly, in this case, the intervenor's interest in the said property has been registered. The plaintiff

A ought to have at least given notice to PBB or at least joined the said bank as a co-defendant to the action. It is not that he had no knowledge of the right of PBB to intervene. The said bank paid the redemption sum to his bank (SCB) and had also released the balance sum of RM22,998.95 to him. It was therefore incumbent upon the plaintiff to have joined PBB as a co-defendant instead of moving surreptitiously only against the defendant/
B chargor. In fact, in his affidavit in support of encl 20, the Branch Manager of PBB affirmed that the intervenor only knew about the judgment in default of defence, when the bank received a copy of the said judgment from the plaintiff's solicitor on 7 March 2002. It is clear therefore that the plaintiff had deliberately withheld any prior information regarding this
C matter from PBB and only served it with the judgment, after everything was over.

If this mode of circumventing the bank's right is allowed, banks will refuse to lend money and commercial practice will grind to a halt. It also makes a mockery of the NLC.

D I have checked the court's file and noted that the plaintiff has not, to date, extracted a fair order of the judgment of the learned SAR in respect of encll 4 and 6. Since prayer (1) of encl 4 was to strike out the defence, the judgment prayed for in para (2) of encl 4 is to enter judgment in default of defence. The plaintiff has eight different prayers in his statement of claim, and only if there is an order of court can this court ascertain if the plaintiff
E has complied with O 19 rr 5(1), 6 or 7(1) of the RHC, because it is clear that if the judgment is under O 19 r 7, that is, where the defendant fails to file a defence, judgment cannot be entered for the plaintiff until an application is made by summons or motion (see *Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, Intervenor)* [1998]
F 5 MLJ 162).

It must also be noted that the curative powers of the court under O 2 r 1 of the RHC to cure non-compliance with the RHC do not apply to default judgments or one taken contrary to O 19 r 7 (see *Syarikat Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129).

G As the principal object of a court is to prevent injustice being done to a party whose rights would be affected by a court's judgment if the court proceeded to hear and determine a matter in dispute without giving that party who will be affected a right to be heard, I allowed PBB the right to intervene and to be added as a co defendant. On my findings, I also saw it fit to set aside the judgment in default of defence entered against the
H defendant. I awarded costs to be in the cause.

PBB allowed the right to intervene and added as the second defendant, and the judgment in default of defence entered against the defendant set aside.

I Reported by Chew Phye Aun